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The Secretary  
Senate Economics Legislation Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

**Email:** [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Sir/Madam

### **SUBMISSION ON THE TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL 2009**

Bank of Queensland Limited (**BOQ**) appreciates the opportunity to make a submission on the *Trade Practices Amendment (Australian Consumer Law) Bill 2009 (unfair terms)*.

Whilst we understand that there are certain pressures on the government to implement the unfair terms legislation, we suggest that it would not be in the government's overall interest to implement it without proper and careful consideration of not only the direct but unintended consequences that may arise.

#### **About Bank of Queensland**

BOQ is an authorised deposit-taking institution (or **ADI**) under the *Banking Act 1959* (Cth).

BOQ currently provides lending products and services through a national branch network. Those branches include traditional branches owned and operated by BOQ (**Corporate branches**) and 'owner-managed branches' owned and operated by third parties not related to BOQ under an agency model (**OMB branches**). BOQ also offers a range of traditional lending products including but not limited to residential home loans, residential and business investment loans, credit cards, personal loans, lines of credit, business overdrafts and factoring financing.

#### **1. Definition of consumer contracts**

The Explanatory Memorandum (2.19-2.20) refers to the scope of the unfair terms legislation being restricted to business-to-consumer transactions and that contracts between businesses (except sole traders) are to be excluded.

The proposed amendments to the *Australian Securities and Investment Commission Act 2001* (ASIC Act) do not make it clear whether it is the nature of the customer's acquisition (i.e. something which is classified as a person, domestically or household item) or the actual purpose of the acquisition (i.e. used personally, for investment or in my business) that is relevant in determining whether an acquisition is "for personal, domestic or household use or consumption."

This causes confusion on the actual ambit of the provision as it applies to the Bank. We note that the *Trade Practices Act 1974* (TPA) and the *Uniform Consumer Credit Code* (UCCC) do generally expand on the wording of "personal domestic or household". For example the TPA provides that a person is not a consumer if their acquisition is for use in trade or commerce (s.4B) and the UCCC provides that a credit contract would be excluded if the borrower has advised is for business or investment purposes.

Some examples:

- a. Mr and Mrs Joe Smith apply for a loan to purchase a residential unit which is currently tenanted and with the intention to continue rent out the property. The funds are used to purchase a residential property which meets the domestic or household use requirement yet the purpose of acquisition is to generate income. This would not be credit covered by the UCCC yet under the ASIC Act it may be considered to be a consumer contract.
- b. Renovation Delights Pty Ltd and Frank Smith apply for a loan to purchase a residential property with the intent to renovate and on-sell for a profit. This means that at least one individual is a party to the lending contract, the funds are being used for domestic or household use yet the purpose of acquisition is to make a profit. This would not be credit covered by the UCCC yet under the ASIC Act it may be considered to be a consumer contract.

Under the UCCC Bank's have been able to rely upon business purposes or personal use declaration unless they have prior knowledge that the use was incorrect. However, no corresponding provision has been included in the ASIC Act. In determining the type of supply, is the stated purpose for the funding at the time of application or what the funds are actually used for relevant?

If it is the actual use of the funds which is relevant, not only is this inconsistent with the UCCC, Bank's may need to revise how some of their standard lending products such as lines of credit, unsecured personal loans and excess funds from refinances are made available and limit the rights of the borrower to direct how those funds are to be used to prevent a change in the purpose during the life of these facilities.

If however it is the applicant's stated purpose for funding at the time of application (which is consistent with the UCCC) then a Bank should be able to rely upon a purpose declaration made by the borrower to that effect at the time of entering into the loan.

Some examples:

- a. Mr and Mrs Joe Smith apply for a business loan. At the time of application they state that this is to purchase a small business, however the subsequently use the funds for their daughter's wedding.
- b. Mr Jones applies for a line of credit. At the time of application he states that this to buy property for investment purposes, however he subsequently uses the funds to undertake renovations on his own home.
- c. Frank Smith obtains a personal loan to acquire tools, equipment and materials for use to provide handy-man services however he subsequently decides to stop work as a handy-man and uses the tools and equipment personally.
- d. A "company as trustee" enters into a loan to purchase a residential property in this case lending to the trust will be treated as if the lending was to a company (as the trust takes on the legal identity of its trustee). During the loan, the trustee retires and two individuals are appointed.

In the above examples the change of purpose during the term of the loan may result in the Bank's contract with the borrower being initially outside the unfair contract regime to suddenly being brought into the regime.

If as a result of the change of purpose the loan changes from not being a consumer contract to a consumer contract this may result in the borrower being able to take advantage of unfair terms provisions and strike out clauses which would not have formed part of the consumer contract had the Bank been advised of the change and been able to act accordingly.

We recommend that a mechanism be established within the proposed amendments to allow companies, contracting with individuals for a particular purpose that may be initially outside the unfair contract regime, to continue to rely on that fact notwithstanding a change in purpose to "personal, household or domestic" during the course of the contract.

## **2. Subject Matter**

s12BI of the unfair terms refers to the "main subject matter of consumer contracts" being excluded from the operation of s12BF. The intent, according to the Exposure Draft, is to ensure that terms which define main subject matter of a consumer contract are not able to be challenged on the basis that they are unfair, with the rationale being that without these terms the Bank would not have offered the service. However the term has not been defined.

Similarly whilst the Exposure Draft explained that for finance contracts, this would be the total amount owing by the consumer which is disclosed at or before the time the contract is entered into, the term "upfront price payable" has not been defined.

The concepts of "main subject matter" and "upfront price payable" are crucial to the operation and drafting of consumer contracts and we would ask that a definition for such terms be included.

## **3. Contracts varied after commencement**

It is unclear whether a variation to contract terms undertaken on a contract entered into prior to commencement of unfair terms will subject the whole contract to unfair terms, or just those terms which have been varied. Similarly, would a renewal of a contract which was in place prior to commencement of unfair terms, subsequently become subject to unfair terms? We submit that government should redraft s.8 to make its intention clear.

## **4. Recommendation**

We recommend that Government further consider whether:

- a purpose test similar to that contained in s4.B to the TPA or exemption provided under s11 of the UCCC is included in unfair terms.
- a mechanism can be established within the proposed amendments to allow companies, contracting with individuals for a particular purpose that may be initially outside the unfair contract regime, to continue to rely on that fact notwithstanding a change in purpose to "personal, household or domestic" during the course of the contract. For example a purpose declaration.
- Defining the terms "main subject matter" and "upfront price payable".
- Consider redrafting s.8 to make it clear whether on variation or renewal of a contract which was in place prior to the commencement of this legislation, are only the varied terms or the whole contract subject to this legislation.

## **5. Transition issues**

Given the government's desire to expedite regulation of unfair terms, we are concerned that there will not be sufficient time for BOQ to properly consider the impact of the changes let alone implement any system or documentary changes that may be required.

Whilst we understand the Government's rationale in wanting to regulate unfair terms, we believe that there are significant unintended consequences that flow from the current drafting that needs to be properly considered. We are extremely concerned by the lack of consultation with industry on what potentially has significant ramifications and impact on

traditional lending products, especially at a time when industry is digesting the not insubstantial changes under the National Consumer Credit Regime.

Please feel free to contact the writer should you wish to discuss any of our concerns further.

Yours faithfully

**Bank of Queensland Limited**

A handwritten signature in black ink, appearing to read 'Joe Tham', with a long horizontal flourish extending to the right.

Joe Tham  
Acting Head of Legal